



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB696]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Issuance of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The National Marine Fisheries Service (NMFS) is issuing a permit to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in the Alaska (AK) Bering Sea, Aleutian Islands (BSAI) Pacific cod pot fishery.

DATES: The permit is effective for a three-year period beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Reference materials for the permit including the final negligible impact determination are available on the Internet at

<https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-ak-bering-sea-aleutian> or

<https://www.regulations.gov/docket/NOAA-NMFS-2021-0123>. Other supporting information is available on the Internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>; 2021 MMPA List of Fisheries (LOF), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock

Assessment Reports (SAR) by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

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SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: (1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; (2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and (3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered (16 U.S.C. 1371(a)(5)(E)). NMFS has determined that the AK BSAI Pacific cod pot fishery meets these three requirements and is issuing a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks (Central North Pacific and Western North Pacific stocks of humpback whale) under the MMPA for a period of three years.

Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and

II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as delegated by the Secretary of Commerce, for a period of up to 3 years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We evaluated ESA-listed stocks or species included on the final 2021 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02-238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, NMFS proposed to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II AK BSAI Pacific cod pot fishery, as classified on the final 2021 MMPA LOF, to incidentally kill or seriously injure

individuals from the Central North Pacific and Western North Pacific stocks of humpback whale (86 FR 71236; December 15, 2021).

NMFS will regularly evaluate other commercial fisheries for purposes of making a negligible impact determination (NID) and issuing section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the AK BSAI Pacific cod pot fishery is available in the 2021 MMPA LOF (86 FR 3028; January 14, 2021) and on the Internet at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

We reviewed the best available scientific information to determine whether the AK BSAI Pacific cod pot fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit for the incidental taking of ESA-listed marine mammals. This information is included in the 2021 MMPA LOF (86 FR 3028; January 14, 2021), the SARs for these species (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>), recovery plans for these species (available at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the documents describing the preliminary and final determinations supporting the permit (available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0123>).

NMFS is in the process of revising humpback whale stock structure under the MMPA in response to the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), and based on the “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The humpback whale DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks.

Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are revised, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (e.g., selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that stock is listed under the Act and overlaps with the analyzed commercial fishery. Therefore, for the purpose of this MMPA 101(a)(5)(E) authorization, we considered the Central North Pacific and Western North Pacific stocks of humpback whales to be ESA-listed as they overlap with the two ESA-listed DPSs: the threatened Mexico DPS and the endangered Western North Pacific DPS.

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103, as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Criteria for Determining Negligible Impact

NMFS relies on a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),” which became effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at:

<https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>. The directive describes NMFS’ process for determining whether incidental

M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing a MMPA section 101(a)(5)(E) permit as noted above).

The directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The first, Total Negligible Impact Threshold (NIT_t), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t . If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s . If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of 3 findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a negligible impact determination). If a commercial fishery has a non-negligible impact on

any ESA-listed stock, then NMFS cannot issue a MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These NID criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determination

NMFS evaluated the impact of the AK BSAI Pacific cod pot fishery using the process outlined in the directive, and, based on the best available scientific information, made a NID.

The Central North Pacific and Western North Pacific stocks of humpback whales are transboundary stocks. As noted above, because of the uncertainty regarding M/SI that occurs outside of U.S. waters for transboundary stocks, we assumed that total M/SI exceeds NIT_t and proceeded directly to the Tier 2 NIT_s analysis. The most recent (2020) final Central North Pacific and Western North Pacific humpback whale SARs documented M/SI of Central North Pacific and Western North Pacific stocks of humpback whale incidental to this fishery (Muto *et al.* 2021).

The estimated annual M/SI of Central North Pacific humpback whales in the AK BSAI Pacific cod pot fishery is 0.2, based on Alaska Marine Mammal Health and Stranding Response Program data. Since this M/SI (0.2) is less than NIT_s (3.59), NMFS determined that the AK BSAI Pacific cod pot fishery has a negligible impact on the

Central North Pacific stock of humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The estimated annual M/SI of Western North Pacific humpback whales in the AK BSAI Pacific cod pot fishery is 0.2, based on Alaska Marine Mammal Health and Stranding Response Program data. Since this M/SI (0.2) is less than NITs (0.39), NMFS determined that the AK BSAI Pacific cod pot fishery has a negligible impact on the Western North Pacific stock of humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The estimated annual M/SI noted above for the Central North Pacific and Western North Pacific stocks of humpback whales is based on a single M/SI event that occurred in an area where the two stocks overlap. This M/SI was assigned to both the Central North Pacific and Western North Pacific stocks (Muto *et al.* 2021) and was therefore included in the NID analysis for each of these stocks. This is conservative as it double counts this single M/SI event and assumes it applies to each stock individually. Furthermore, this also conservatively assumes that this M/SI necessarily involved a humpback that is listed under the ESA, despite a large portion (approximately 91 percent) of the humpback whales in the Aleutian Islands, Bering Sea, Chukchi Sea, and Beaufort Sea area estimated to be part of the Hawai'i DPS, which is not listed under the ESA (Wade 2021, NMFS 2021). However, as discussed above, the humpback whale MMPA stock designations are currently being revised in response to the ESA-listed DPSs. In revising humpback stocks, NMFS is evaluating the available data and methods to apportion the M/SI to the individual stocks in areas where they overlap. Once the revised stock designations are finalized and the M/SI for those stocks is analyzed, the MMPA 101(a)(5)(E) authorization will be modified as appropriate.

The 2020 SAR includes the mean annual total commercial fishery-related M/SI (9.8) for the Central North Pacific stock of humpback whale and (0.9) for the Western

North Pacific stock of humpback whale. This comprises M/SI from all commercial fisheries, including the AK BSAI Pacific cod pot fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery. The SARs for both stocks also include unattributed fishery-related M/SI (7.9 for Central North Pacific, 0.4 for Western North Pacific), which is not assigned to a specific commercial fishery. This unattributed fishery-related M/SI could be from any number of commercial or recreational fisheries, including the AK BSAI Pacific cod pot fishery. In accordance with NMFS Procedural Directive 02-204-02, because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include unattributed mortality in the calculations for the NID Tier 2 analysis (NMFS 2020).

In addition, because the Central North Pacific and Western North Pacific stocks of humpback whales are considered to be transboundary stocks, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion. NMFS is actively monitoring the AK BSAI Pacific cod pot fishery through the North Pacific Fisheries Observer Program. Further, most of the information on large whale entanglements in Alaska is reported to and documented by the Alaska Large Whale Entanglement Response Program. If additional fishery-related M/SI of the Central North Pacific or Western North Pacific stock of humpback whale is documented through the observer program or the Alaska Marine Mammal Health and Stranding Response Program that indicates additional M/SI of the Central North Pacific or Western North Pacific stock of humpback whale in the AK BSAI Pacific cod pot fishery, then NMFS will re-evaluate the NID and the permit.

The NID analysis is presented in an accompanying MMPA section 101(a)(5)(E) determination document that provides summaries of the information used to evaluate each ESA-listed stocks documented on the 2021 MMPA LOF as killed or injured incidental to the fishery (available at: <https://www.fisheries.noaa.gov/action/mmpa-list->

fisheries-2021). The final MMPA 101(a)(5)(E) determination document is available at: <https://www.fisheries.noaa.gov/action/negligible-impact-determination-and-mmpa-section-101a5e-authorization-ak-bering-sea-aleutian> or <https://www.regulations.gov/docket/NOAA-NMFS-2021-0123>. Based on the criteria outlined in the directive, the most recent SAR, and the best available scientific information, NMFS has determined that the M/SI incidental to the Category II AK BSAI Pacific cod pot fishery will have a negligible impact on the associated ESA-listed marine mammal stocks (Central North Pacific and Western North Pacific stocks of humpback whale). Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for the commercial fishery (see MMPA 101(a)(5)(E) determination document available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0123>).

Recovery Plan

The humpback whale recovery plan has been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>). Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Take Reduction Plan

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stocks considered for this permit are designated as a strategic stock under the MMPA because the stocks, or a component of the stocks, are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The short- and long-term goals of a TRP are to reduce M/SI of marine mammals incidental to commercial fishing to levels below the Potential Biological Removal (PBR) level for stocks and to an insignificant threshold, defined by NMFS as 10 percent of PBR, respectively. The obligations to develop and implement a TRP are subject to the

availability of funding. MMPA section 118(f)(3) (16 U.S.C. 1387(f)(3)) contains specific priorities for developing TRPs when funding is insufficient. NMFS has insufficient funding available to simultaneously develop and implement TRPs for all strategic stocks that interact with Category I or Category II fisheries. As provided in MMPA section 118(f)(6)(A) and (f)(7), NMFS uses the most recent SAR and LOF as the basis to determine its priorities for establishing Take Reduction Teams (TRT) and developing TRPs. Information about NMFS' marine mammal TRTs and TRPs may be found at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

Based on NMFS' priorities, implementation of a TRP for the AK BSAI Pacific cod pot fishery is currently deferred under MMPA section 118 as other stocks/fisheries are a higher priority for any available funding. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see determination supporting the permit available on the Internet at <https://www.regulations.gov/docket/NOAA-NMFS-2021-0123>).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. The AK BSAI Pacific cod pot fishery is monitored under the partial coverage category through the North Pacific Fisheries Observer Program. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery

license, registration, or permit systems for Category I and II fisheries on the LOF.

Therefore, the requirement for vessel registration is satisfied.

Conclusions for Proposed Permit

Based on the above evaluation for the AK BSAI Pacific cod pot fishery as it relates to the three requirements of MMPA section 101(a)(5)(E), we are issuing a MMPA 101(a)(5)(E) permit to the AK BSAI Pacific cod pot fishery to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the three-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify the authorization, after notice and opportunity for public comment.

ESA Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of the AK BSAI Pacific cod pot fishery on ESA-listed marine mammals, were analyzed in the ESA section 7 Biological Opinion for the BSAI Groundfish Fishery Management Plan.

Under section 7 of the ESA, Biological Opinions analyze the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, exempt anticipated future take of ESA-listed species as specified in the incidental take statement. Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the negligible impact determination process, and when the necessary findings can be made, issues a MMPA section 101(a)(5)(E) permit that allows for an unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations.

Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, may not always align.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because the permit would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plan is required for the permit. Issuing the permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

Public Comments

On December 15, 2021, NMFS published a notice and request for comments in the **Federal Register** for the proposed issuance of a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II AK BSAI Pacific cod pot fishery (86 FR 71236). The public comment period closed on December 30, 2021. NMFS received one non-substantive comment letter opposing the proposed issuance of the permit and underlying preliminary negligible impact determination.

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